STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 21AP938-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

vs.

QUAHEEM O. MOORE,

Defendant-Respondent.

ON APPEAL FROM A DECISION AND ORDER OF THE WISCONSIN COURT OF APPEALS, DISTRICT IV, AFFIRMING AN ORDER GRANTING A MOTION TO SUPPRESS EVIDENCE ENTERED IN WOOD COUNTY CIRCUIT COURT, THE HONORABLE NICHOLAS J. BRAZEAU, JR. PRESIDING

RESPONSE BRIEF OF DEFENDANT-RESPONDENT

Respectfully submitted,

QUAHEEM O. MOORE
Defendant-Respondent.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

STATEMENT OF THE ISSUES

I. Did the State meet its burden of proof at the suppression hearing regarding unmistakability under ***Secrist***?

CIRCUIT COURT: NO.
COURT OF APPEALS: NO.
This Court should affirm the lower courts.

II. Did the State prove that officers had probable cause to arrest Moore under the totality of circumstances test?

CIRCUIT COURT: NO.
COURT OF APPEALS: NO.
This Court should affirm the lower courts.

III. Given the legalization of hemp products, should this Court lower the unmistakability standard for an odor of marijuana required to satisfy probable cause to arrest under ***Secrist***?

Neither the circuit court nor the Court of Appeals addressed this issue, but it hinges on the same legal principles, and therefore should be decided by the Court to harmonize the law and avoid future litigation, pursuant Wis. Stat. § 809.62(3)(e).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court indicated that both oral argument and publication are appropriate.

SUMMARY OF ARGUMENT

This matter began as an interlocutory appeal by the State following the circuit court's order granting suppression of evidence. More specifically, the circuit court suppressed evidence derived from the unlawful search of Moore's person. In circuit court, the State argued that the police officer's search of Moore's person was voluntary. R. 12:4–5; State Br. at 15 (The State abandoned this argument on appeal and in its petition for review to this Court). In the alternative, the State argued that the search was justified through probable cause to arrest. The State relied on ***State v. Secrist*** for the probable cause argument. (Petitioner Brief. 27–28); *See generally* ***State v. Secrist***, 224 Wis. 2d 201, 589 N.W.2d 387 (1999) (establishing the requirement for the odor of marijuana to be "unmistakable").

Throughout these proceedings, the State argues that the Court of Appeals misapplied the holding of ***Secrist***. According to the State, the Court of Appeals created a higher standard of proof for probable cause to arrest a person based on odor of marijuana. But it is the State who wishes to change the standard of proof in a marijuana case like that of Mr. Moore. The State wishes to remove the requirement of ***Secrist*** that the odor of marijuana be "unmistakable." The State conceded in circuit court that the odor of CBD and marijuana are identical but still asked the circuit court to find that the odor perceived by the officers was unmistakably marijuana. By asking this Court to find that the odor perceived by officers was unmistakably marijuana and that this Court change the factual findings of the lower court, the State seeks a lower standard of proof in possession of marijuana cases. If the odor of marijuana need not be unmistakable, and if it need not be tied to a specific individual, Mr. Moore's arrest would be upheld. But removing these requirements does not comport with the holding of ***Secrist***.

Every arrest in Wisconsin must be justified by probable cause. As every criminal law practitioner knows, the probable cause inquiry is a fact-specific, totality of the circumstances test. In ***Secrist***, this Court ruled that law enforcement may arrest an individual based on an odor of marijuana alone—the arrest may happen as soon as officers make contact with an individual. There need not be corroboration in the form of marijuana paraphernalia, marijuana particles, or a marijuana cigarette. There are few immediate encounters with law enforcement that may result in so fast an arrest decision. In ***Secrist***, the officer made contact with the individual. He was seized and arrested early in his contact with the officer. The Court in ***Secrist*** considered the facts under a totality of the circumstances analysis. In considering the evidence presented by the State, the Court found that ample probable cause existed to justify the arrest for possession of marijuana.

To justify such a seizure and arrest, two conditions must be met. First, the odor must be unmistakably marijuana. Second, that there must be a link between the odor of marijuana and the individual detained by police. In Moore's case, the State failed to demonstrate that the odor from the vehicle was indeed marijuana. Because the State failed to demonstrate that the perceived odor was in fact an illegal substance, the State failed to meet its burden under ***Secrist***. There could be no probable cause to search or arrest Moore. In circuit court, the State failed to present any evidence of the officers' respective training or proficiency in detecting the odor of marijuana—or even that they in their lifetimes previously smelled an odor of marijuana. Because the State failed to prove the odor was marijuana, the lower court did not examine whether the State linked the odor of the substance to Mr. Moore.

The State seeks to lower the probable cause burden of ***Secrist***. The State conceded in circuit court that hemp products, which do not impair individuals, smell identical to

marijuana. By changing the definition of unmistakable, the State seeks to remove the unmistakable requirement of ***Secrist***. By its definition, an unmistakable odor may not be mistaken for that of any other substance. If an officer may arrest an individual based on an odor that may be hemp, that lowers the standard of proof in a case like that of Moore. In lowering the standard of proof required under ***Secrist***, the State seeks an exception to the constitutional requirement of probable cause to arrest.

STATEMENT OF THE CASE AND FACTS

On November 17, 2019, Officer Libby Abel initiated a traffic stop of a vehicle driven by the defendant for a suspected speeding violation and no other infractions. R. 11:1–5. Upon initiating the traffic stop, Abel claimed that she observed a liquid spray coming from the driver's side window. R. 23:19–20. Abel approached the passenger side of the vehicle and made contact with the defendant. Abel indicated that she "could smell the odor of marijuana coming from within the vehicle." Officer Mack Scheppler arrived on scene to assist and indicated that he also "did notice the odor of marijuana emitting from the vehicle which [he] recognized based on [his] training and experience." R. 23:20. Abel informed the defendant of the reason for the stop (speeding violation) and asked him if he had thrown a liquid from his window. R. 23:19. The defendant denied throwing anything out of his window. *Id*. The defendant indicated that he was not the owner of the vehicle and that it was a rental that he was borrowing from his brother. R. 23:27.

Subsequently, Abel asked the defendant to step out of his vehicle and she conducted a thorough pat down Terry search of the defendant. Abel did not locate any weapons or contraband during the pat down search, nor did she indicate that she suspected the defendant was concealing anything on his person. R. 23:21. Abel questioned whether the defendant had consumed any alcohol, and he informed her he had not consumed any

alcoholic beverages that day; Abel indicated she could not smell alcohol coming from the defendant or in the vehicle. R. 23:25–26. Abel continued to question the defendant regarding the liquid she indicated she had seen thrown out the window as well as the smell of marijuana. R. 23:29–30. The defendant continued to deny having thrown anything from his window or having any marijuana in the vehicle. *Id.* Moore asked officers if they could smell any marijuana on his person.

In reviewing the body camera video footage, officers indicate that they are unable to smell marijuana on the defendant's person. R. 23:28. Scheppler informed Moore that he would be conducting a search of his person based on the odor of marijuana from the vehicle despite not smelling marijuana on his person. R. 23:22. Scheppler found nothing of evidentiary value during his initial/first body search of the defendant; Abel then began to search the defendant's vehicle. R. 5:3.

A few minutes later, Scheppler conducted a second body search of Moore claiming he had not searched the area around the defendant's belt buckle and claiming it was positioned higher than the top of his jeans. R. 23:7–10. During this second body search, Scheppler felt what he believed to be contraband in a plastic bag in the zipper area of the defendant's pants. *Id.* Officers placed Moore in handcuffs for officer safety but informed Moore that he was not under arrest at that time and that he was being detained. *Id.* Officers then conducted a third, more invasive, body search (which the circuit court found to be a continuation of the second search) of Moore's zipper area and located two plastic baggies which were believed to contain cocaine. *Id.* Moore was then subsequently arrested for Possession of Cocaine. *Id.*; R. 5:3. Officers continued to search the vehicle on scene and later towed the vehicle and held it for investigative purposes. Officers eventually found a tenth of a gram of marijuana in the vehicle. *See id.*

Subsequently, in November 2019, Quaheem Moore was charged with possession with intent to deliver narcotics and possession with intent to deliver more than one but less than five grams of cocaine, as second and subsequent offenses. R. 5:1–2.

Moore filed a motion to suppress evidence. R. 11:1. Moore argued that, at the time, officers had already completed a protective search for weapons, and the body search was not lawful because officers lacked probable cause to arrest Moore. R. 11:3–4. Moore acknowledged that the odor of marijuana may provide grounds to search a vehicle but argued that officers lacked probable cause to arrest in this case under the totality of the circumstances, given that the vehicle was not his, the odor was not tethered to him in any way and officers conceded that the odor was not coming from him. *Id.*

The circuit court, the Honorable Nicholas J. Brazeau, Jr., presiding, held an evidentiary hearing on the motion on September 15, 2020. The investigating officers testified, and the State played the second officer's video body camera. R. 23:1–2.

On April 8, 2021, the circuit court rendered its decision granting Moore's motion to suppress. R. 16:1–4. The court held that Officer Scheppler's search of Moore was not a protective search under ***Terry v. Ohio*** because the officers alleged that the search was based on an odor of marijuana—while they had already conducted a protective search. R. 16:2–3; *see also* ***Terry v. Ohio***, 392 U.S. 1, 27–29 (1968) (requiring reasonable belief that the individual is armed and dangerous to conduct a protective search and limiting such search to what is reasonable for the safety of the officer and others around). The court noted that this would only have been a lawful search if it was incident to arrest. R. 16:3.

Further, the court noted that the search of the vehicle was lawful because the odor of marijuana gives probable cause to search a vehicle. *Id*. Further, it acknowledged that the odor of marijuana detected during a traffic stop may give probable cause to arrest the

driver and sole occupant of the vehicle, citing ***Secrist***, 224 Wis. 2d. 201, 204 (1999). After applying all the facts to the law, the court concluded that officers did not have probable cause to arrest Moore because the link between Moore and the odor in the vehicle not only diminish but was dissipated as officers continued to investigate and inquire on scene. R. 16: 3–4. Further, when Moore was taken out of the vehicle, the officer no longer noted any odor of marijuana, further diminishing any nexus to further probable cause. *See id.* As the court noted:

> The probability diminishes if the odor is not strong or recent, if the source of the odor is not near the person, if there are several people in the vehicle, or if a person offers a reasonable explanation for the odor. In this case, once the defendant exits the vehicle, both officers note that the strong marijuana smell emanates from the vehicle. Neither officer links the smell specifically to the defendant, after he exited the vehicle. In fact, Abel notes that she can't smell the marijuana on the defendant when he confronts her with that question. The defendant has offered a reasonable explanation for the odor, but more importantly, once out of the vehicle the source of the odor was not near the person. As the odor of marijuana was not linked to the defendant, the officers did not have probable cause to arrest him.

R. 16:3–4.

Court of Appeals Decision

In accordance with ***Secrist***, the Court of Appeals firstly examined whether the officers had probable cause to believe that a crime had been committed. The Court assessed whether the officers had probable cause to believe a crime was committed based solely on the suspected odor they detected. Ultimately, as directed by ***Secrist***, the Court determined that the record reflected that the odor was not unmistakably that of marijuana, pursuant to ***Secrist***, therefore, the officer lacked probable cause. The Court then determined whether, based on the totality of circumstances, other facts known to the officers provided probable cause to believe a crime had been committed.

Similarly, based upon the facts in the record, the Court found that there was a paucity of facts to substantiate a finding of probable cause to arrest Moore.

I. Applicable Caselaw

The issue here is whether there was probable cause to justify Moore's arrest. The foundational case is ***Secrist***, 224 Wis. 2d. 201. Before ***Secrist***, the probable cause standard to arrest was outlined in the Fourth Amendment to the United States Constitution and Article I, sec. 11 of the Wisconsin Constitution. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The probable cause standard exists to "safeguard the privacy and security of individuals against arbitrary invasions by government officials." ***State v. DeSmidt***, 155 Wis. 2d 119, 130, 454 N.W.2d 780 (1990) (citing ***State v. Boggess***, 115 Wis. 2d 443, 448–49, 340 N.W.2d 516 (1983)). The quantum of evidence required to show probable cause is the same whether one is concerned with an arrest warrant or a search warrant. *See* Wayne R. LaFave, Search and Seizure: A Treatise on the fourth Amendment § 3.1(b) (2d ed. 1987). By requiring an arrest warrant, our founders protected an individual from unreasonable seizure. The reviewing magistrate or judge issues the warrant only upon a showing that probable cause exists that the individual committed a criminal offense.

In ***Brinegar v. United States***, the United States Supreme Court explained the tension between an individual's privacy interest and the community's protection:

> These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts

> leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.

Brinegar v. United States, 338 U.S. 160, 176 (1949).

In ***State v. Mitchell***, the Wisconsin Supreme Court ruled that the quantum of evidence to find probable cause must be:

> More than a possibility or suspicion that the defendant committed an offense, but the evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not. The information which constitutes probable cause is measured by the facts of the particular case.

State v. Mitchell, 167 Wis. 2d 672, 681–82, 482 N.W.2d 364 (1992) (citation omitted)).

In ***Secrist***, the Wisconsin Supreme Court considered whether an individual may be arrested after an officer detected what he perceived to be an odor of burnt marijuana emanating from a vehicle the individual drove. ***Secrist***, 224 Wis. 2d at 213. The driver in ***Secrist*** made voluntary contact with law enforcement and asked for directions. Immediately, the officer detected what he perceived to be a strong odor of burnt marijuana emanating from the vehicle. There were no other passengers inside the vehicle. The officer testified he recognized the odor due to over 23 years of law enforcement experience with the substance. After he detected the odor, the officer ordered the individual to pull over and exit his vehicle. The individual complied. The officer arrested the individual for possession of marijuana. Following the arrest, other officers searched the vehicle, at which point, they discovered a marijuana cigarette and "roach clip" next to the driver seat. ***Id.*** at 205.

No search of the vehicle was conducted prior to arrest. The parties in ***Secrist*** conceded that there were sufficient facts to justify a search of the ***automobile.*** A search of a vehicle may occur where there is probable cause to believe that the vehicle contains evidence of a crime. ***Id.*** at 210. However, the Court considered carefully whether probable cause existed to arrest the *individual*. Ultimately, an individual may be arrested for possession of a controlled substance where there is an odor of the substance that is unmistakable and where the odor may be linked to a specific person. While the odor of marijuana in a vehicle normally provides probable cause to arrest the individual, probable cause decreases if the odor is not strong, recent, if the source is not near the person, if there are several individuals in the vehicle, and if there is a reasonable explanation for the odor.

STANDARD OF REVIEW

This Court will uphold a circuit court's findings of fact unless they are clearly erroneous when reviewing an order granting or denying a motion to suppress evidence. ***See State v. Turner***, 136 Wis. 2d 333, 343-44, 401 N.W.2d 827 (1987); ***see also*** Wis. Stat. § (Rule) 805.17(2); ***Secrist***, 224 Wis. 2d at 207. However, the Court will engage in *de novo* review as to whether the historical facts meet the constitutional standard of probable cause to arrest. ***Secrist***, 224 Wis. 2d at 208.

SUMMARY OF ARGUMENT

II. The State seeks to have this Court create a *per se* rule to the *Secrist* standard of unmistakability, thereby lowering the well settled standard for probable cause to arrest based upon odor.

As established, ***Secrist*** addresses a factual scenario from 1999 wherein the unmistakable odor of THC sufficiently establishes probable cause. Ultimately, an individual may be arrested for possession of a controlled substance, namely THC, where there is an odor of the substance that is unmistakable and where the odor may be linked

to a specific person. Despite this well settled law the State seeks to have this Court weaken the standard and create a *per se* exception to this factual scenario, by dwindling this two-part test down to a flimsy standard tantamount to *ipse dixit*. (Petitioner Br. 27–28) Specifically, the State asserts that the lower court, in effect, raised the standard, when that court highlighted the ***Secrist*** standard and noted how the State failed to meet it. (Petitioner Br. 27–28). The State failed to proffer any evidence as to either officers' ability to not only recognize but distinguish the odor of THC, which ***Secrist*** mandates. ***Secrist***, 224 Wis. 2d at 216. The State notes in its brief that ***Secrist*** held "it is important in these cases to determine the extent of the officer's training and experience in dealing with the odor of marijuana" ***Id.*** at 216. Despite this plain language about what is required, the State attempts to circumvent this by alleging that it is not clear that testimony of officer training and experience detecting an odor of marijuana was necessary for the court's analysis. (Petitioner Br. 24).

Furthermore, the record is devoid of evidence that meets the second part of the test—the linkage to Moore. As established, the officers acknowledged that when Moore exited the car, they could not smell the odor on Moore, and it was not Moore's vehicle. However, despite this record, the State wants this Court to hold that when an officer believes that the odor is <u>*possibly*</u> THC, the ***Secrist*** standard should be satisfied. (Petitioner Br. 27–28). As the ***Secrist*** Court established, the unmistakable odor goes to probability, which is higher than possibility. ***Secrist***, 224 Wis. 2d at 212. This Court required more than the mere possibility that the odor is marijuana, hence, unmistakability of the odor and the linkage to the suspect. *See* ***id.*** If the odor is not unmistakable, then the analysis reverts to a well-established totality of circumstances analysis. This odor, which is possibly THC, is simply one factor to be determined with all other evidence garnered at the scene. *See*

id. Secrist was simply a recognition of a factual reality, at the time—when the odor is unmistakable, then there is probable cause to arrest, when it is not, there must be more.

Given the legalization of CBD and its inability to be distinguished by smell alone from marijuana, the State now seeks a judicially created lower standard. This standard would be lower than that of ***Secrist***, basically requiring mere possibility of the odor. The State's standard would not require officer training or experience to distinguish the perceived odor as a probable unlawful order. A well-established probable cause standard, even as it relates to the odor of THC, should not be lowered. The State is implicitly saying ***Secrist*** was wrong and using this case as an attempt to make new law. This would also result in situations where CBD and hemp, which are lawful, would lead to more traffic stops of innocent citizens. That is not what this Court's jurisprudence has historically done, as this Court carefully reviews any purported exceptions to the warrant requirement.

Further, the State asserts that the Court of Appeals misstated the State's arguments. According to the State, the Court of Appeals conflated or confused burnt marijuana with the raw marijuana smelled in this case. (Petitioner Br. 29). Whether burnt or raw, the State refers to nothing in the record that establishes the officers' ability to distinguish the smell as required by ***Secrist***. The form of marijuana does not alleviate the standard of making the smell unmistakable. The State refers to no information that buttresses the assertion that the odor of CBD or marijuana is unmistakable. It certainly failed to meet that standard at the suppression hearing. It further seemingly conceded the indistinguishable odor of (raw or burnt) CBD from that of marijuana. (Petitioner Br. 29). This mistake, if it indeed was one, is unpersuasive and does not alter the analysis for this Court.

1. Simply because the odor of THC is unlikely to be unmistakable as it stands with the legalization of CBD, it does not render *Secrist* unworkable or require a lowering of the *Secrist* standard to the State's benefit. It simply allows odor to be a single factor in the well settled totality of circumstances analysis for probable cause to arrest.

Twenty-four years ago, this Court gave the odor of cannabis great weight. This single factor (requiring unmistakability and linkage) satisfied the test to establish probable cause to arrest. This is because the odor of cannabis was overwhelmingly and uniquely tied to criminal behavior. ***Secrist***, 224 Wis. 2d at 218–19.

Twenty-four years in the wake of ***Secrist***, the relative weight of cannabis odor has significantly diminished with the legalization of certain cannabis products. Since 2017, the Wisconsin Legislature and federal regulators legalized cannabis products that are indistinguishable by odor from unlawful cannabis products. *See* Wis. Stat. §§ 94.55(1) and (2)(a), 961.32(2m)(b) and (3)(b); Agriculture Improvement Act of 2018, (P.L. 115–334).[1] Wisconsin's Department of Justice has acknowledged that scientific literature and experts in the field found that, at this point, there is no way for law enforcement to distinguish between legal and illegal cannabis by odor alone.[2] THC and CBD are odorless compounds, meaning that humans cannot tell the difference between lawful and unlawful cannabis products based on odor. *See id.*

The odor of cannabis can no longer be awarded such great weight as it was in ***Secrist***. To do as the State requests and lower the burden by incorrectly applying a *per se* probable cause rule is contrary to the law and science. It is ignorant of the facts and

[1] Legal cannabis products are defined as "a derivative or extract of the plant cannabis sativa L. [hemp] that contains cannabidiol and a delta-9- tetrahydrocannabinol [THC] concentration at a level without a psychoactive effect." Wis. Stat. § 961.01(3r).

[2] Wisconsin Department of Justice Law Enforcement Bulletin, Hemp or Marijuana: A New Tool for Law Enforcement (April 20, 2020); *see also* North Carolina Bureau of Investigation Memo, Industrial Hemp/CBD Issues (May 2019).

circumstances of each case. While the ***Secrist*** standard at this point may be out of grasp with respect to unmistakability, that can change with technological advancement—as ***Secrist*** simply recognized a factual scenario at a certain point in history, but to lower the state's burden and the requirement of probable cause to arrest simply flies in the face of Fourth Amendment jurisprudence.

The odor of cannabis, in light of the legalization of some cannabis products, still may create a possibility or reasonable suspicion of an offense. With reasonable suspicion, an officer may further investigate the odor. However, in Wisconsin, the odor alone without extraordinary facts fails to satisfy the burden of probable cause to arrest. In accordance with the state and federal constitutional provisions,[3] probable cause must exist to justify a warrantless search of a motor vehicle. ***United States v. Ross***, 456 U.S. 798 (1982); ***Secrist***, 224 Wis. 2d at 210. It is well settled that probable cause requires more than a possibility or suspicion that the defendant committed an offense. ***Id.*** Moreover, the subjective view of the officer is irrelevant. ***Beck v. Ohio***, 379 U.S. 89 (1964). A bedrock principle of probable cause is that it is evaluated under an objective totality of the circumstances test. ***Illinois v. Gates***, 462 U.S. 213 (1983); *and* ***State v. Ward***, 2000 WI 3, ¶ 26, 231 Wis. 2d 723, 604 N.W.2d 517. Historically, this Court has refused to create bright line, *per se* rules when applying the totality of the circumstances test. *See e.g.,* ***State v. Kyles***, 2004 WI 15, ¶ 46, 269 Wis. 2d 1, 675 N.W.2d 449 (refusing to adopt a *per se* "hands-in-the-pockets rule" to justify search). Rather, this Court repeatedly held that when considering the totality of the circumstances, no single factor is dispositive, given that the determination is made on a case-by-case analysis. *See* ***State v. Gralinski***, 2007 WI App

[3] The State of Wisconsin traditionally interprets the Fourth Amendment to the United States Constitution and Article I, § 11 of the Wisconsin Constitution in concert, thus, the development of search and seizure law parallels. *See* ***State v. Andrews***, 201 Wis. 2d 383, 389, 549 N.W.2d 210 (1996).

233, ¶ 15, 306 Wis. 2d 101, 743 N.W.2d 448; *See also* ***State v. Romero***, 2009 WI 32, ¶ 17, 317 Wis. 2d 12, 765 N.W.2d 756. The proper approach in "a totality-of-the-circumstances test …[is]… a balanced assessment of the relative weights of all factors that would establish probable cause…" ***Illinois v. Gates***, 462 U.S. 213, 258 (1983). The same should apply here.

a. This development in the law should be treated no differently than OWI law. Unlike the State suggests, odor should not be given greater weight than any other factor.

While the legalization of CBD products does render unmistakability to be a standard currently out of the State's grasp, the status quo of jurisprudence should not be seen to be unworkable or require some change. In the era of Prohibition, the unmistakable odor of alcohol may have established probable cause to search a vehicle. However, as we know, we eventually disbanded with Prohibition. Had courts created a *per se* "beer odor rule," defendants might still be subjected to searches based upon beer odor *alone*, because possession of alcohol was a crime. Fortunately, no such rule was created.

Notwithstanding the absence of a rule, law enforcement was not stripped of its ability to enforce the law as it related to OWI. Today, given the legalization of the possession of alcohol, within parameters, the odor of alcohol alone fails to establish probable cause to arrest. Officers are required to note other signs of impairment in addition to the odor of alcohol. This is a logical development because the odor of alcohol alone cannot satisfy the totality of circumstances test for probable cause to arrest.

Routinely, lower courts analyze cases under the totality of circumstances before finding probable cause to arrest. The courts do not stop the analysis at odor but note, for instance, the defendant's demeanor, the recency of consumption of alcohol, open intoxicants within the vehicle, the odor of alcohol emanating from the vehicle and/or the

defendant, speech, and eyes. *See* ***State v. Howes***, 2017 WI 18, ¶ 30–32, 373 Wis. 2d 468, 893 N.W.2d 812; *but see* ***State v. Lange***, 2009 WI 49, ¶ 36, 317 Wis. 2d 383, 766 N.W.2d 551 ("Although evidence of intoxicant usage—such as odors, an admission, or containers—ordinarily exist in drunk driving cases and strengthens the existence of probable cause, such evidence is not required").

This makes sense given that that odor alone is not unmistakable for contraband or a violation of the law. Just as in Prohibition, the absolute illegality of all cannabis products dissipated with the legalization of certain products. Now it is legal to possess and use certain cannabis products, even those that contain amounts of THC under certain limits. The odor of those products is indistinguishable from unlawful products. Therefore, to establish probable cause, law enforcement need only point to other factors in addition to odor to satisfy the totality of circumstances test. Odor is not given greater weight. It has always been a single factor among others in the determination. Again, ***Secrist***, recognized a factual scenario given the state of the law, a complete ban on cannabis products, thereby rendering an unmistakable odor of THC as sufficient to establish probable cause. Should advancements in technology cause the unmistakability standard to again be within the State's grasp, they will again be able to meet the standard given in ***Secrist***—until then odor is simply a factor, like any other used in the totality of circumstances test.

2. The State conflates the requirement of unmistakability with that of an officer's discretion to refrain from accepting innocent explanations from a suspect under a totality of circumstances analysis.

With respect to Moore, the lower court accounted for the fact that the officer is not required to accept an individual's innocent explanation. ***State v. Holstad***, 2003 WI App 25, 260 Wis. 2d 406, 659 N.W.2d 394. The State repeatedly refers to the fact that an officer need not accept an innocent explanation for an odor. (Petitioner Br. 32) This is

true. However, the State conflates an 'innocent explanation' with the standard of 'unmistakability.' For the odor alone to be sufficient to establish probable cause, an officer must rule out innocent/lawful explanations, or the odor is not unmistakable.

This is not a reasonable doubt standard, as the State suggests. This is a standard for probable cause to arrest based on odor; therefore, it requires "unmistakability." This is why the lower court then stated, "with no ability to identify the odor of marijuana or distinguish it from CBD, the officers could not rule out CBD, or even meaningfully undermine it, as the source of the odor." ***Moore***, 2022 WL 2978311, ¶ 31. Thus, "the odor cannot be unmistakably that of [illegal cannabis]" given the indistinguishable legal odors. ***Id.*** "Therefore, with the application of ***Secrist*** to Moore's facts, the odor alone did not supply officers with probable cause to believe that a crime was committed." ***Id.*** ¶ 32.

The Court of Appeals then proceeded to apply the true test for probable cause – the totality of the circumstances. *See* ***id.*** After the application, the Court of Appeals held that in light of all the circumstances, the State failed to establish that with the facts available to officers that probable cause had been established. Therefore, the court did not hold that officers had to rule out innocent explanations under the totality of circumstances analysis. It held that ***Secrist*** is clear that for the odor to be unmistakable, the officer must be able to distinguish it as that of the illegal substance of THC and link it to the suspect to furnish probable cause. Then the officer must rule out lawful explanations for the odor for it to be unmistakable. Again, the State seeks to lower the burden and create a *per se* rule that when an officer believes that it could possibly be THC, that is sufficient. That is not the law and should not be.

III. The State repeatedly attempts to shift their burden at a suppression hearing to Moore by deflecting from the evidence it did not adduce, as required, to highlighting what Moore may or may not have said.

The State bears the burden at a suppression hearing to prove that a warrantless seizure is constitutionally reasonable. *See* ***State v. Taylor***, 60 Wis. 2d 506, 519, 210 N.W.2d 873 (1973). It is well settled that a suppression hearing this burden is the State's. *See* ***id.*** Despite this the State attempts to shift focus and blame Moore for the information and lack thereof garnered at the suppression hearing. For instance, the State makes much ado about how Moore never confirmed whether the substance in the vape pen was CBD, and how it was not highlighted at the hearing what the liquid was that was dispelled from the car.

The State fails to acknowledge that at a suppression hearing, it has to establish the facts that would lead the court to find that there was sufficient evidence garnered to establish probable cause to arrest. ***Secrist***, 224 Wis. 2d at 216. The State does not get to fail at its responsibility in the trial court or attempt to surreptitiously hold Moore accountable for the State's failure. Simply put, the State did not meet the burden of unmistakable odor under ***Secrist***. It failed to garner and proffer the requisite quantum of evidence to buttress a finding of probable cause under the totality of circumstances. Shifting the responsibility to Moore or attempting to lay its fault at the feet of the Court of Appeals should be unpersuasive.

IV. In accordance with *Secrist*, both lower courts found there to be a paucity of evidence to substantiate a finding of probable cause to arrest based upon the odor of THC.

A necessary component of probable cause to arrest is probable cause to believe a crime has been committed. ***Secrist*** held that the odor of marijuana, alone, will generally suffice to establish probable cause to believe that a crime has been committed. ***Secrist,*** 224 Wis. 2d at 217. However, ***Secrist*** requires that the odor of marijuana be "unmistakable" for the odor alone to have such an effect. ***Id.*** at 216. It is imperative that

the officer be able to link the unmistakable odor of marijuana to a specific person and that this linkage be "reasonable and capable of articulation." ***Id.*** at 218. The odor of marijuana in an automobile may provide probable cause to believe the driver of the vehicle is linked to the drug. ***Id.*** at 217. However, the probability of linkage diminishes if the odor is not strong or recent, if the source of the odor is not near the person, if there are several people in the vehicle, or if a person offers a reasonable explanation for the odor. ***Id.*** at 218.

The State failed to establish that the odor detected was unmistakably that of marijuana for several reasons. First, the State did not offer any evidence at the suppression hearing that the officers had training or experience that enabled them to reliably identify the odor of marijuana. Further, Officers Abel and Scheppler claimed to have smelled an odor of marijuana coming from the vehicle when making contact with the defendant. Neither officer noted whether the smell was strong or recent during their initial contact with the defendant. Further, when the defendant was removed from the vehicle, body camera video confirms that the defendant denied having any knowledge of marijuana in the vehicle and asked officers if they could smell any odor of marijuana on his person; Officer Abel replied that she did not observe an odor of marijuana on the defendant's person. R. 23:28; *See also* R. 21:10. As discussed above, to assess whether the odor was unmistakably that of marijuana, ***Secrist*** directs courts to assess the officers' testimony regarding their training and experience in identifying the odor of marijuana, as well as its strength, recency, and source. ***Id.*** at 216.

The officers testified that they detected the odor of marijuana coming from Moore's vehicle. In this case, both officers did assert that they smelled the odor of marijuana emanating from the vehicle, which would seem to strengthen the probable cause in accordance with ***Secrist***. *See* ***id.*** Conversely**,** when searching the vehicle on scene, Officer

Abel claimed and noted in her report that she observed an "overwhelming odor of marijuana coming from the area of the center console;" however, as noted previously, a total of less than one tenth of a gram of shake was recovered after multiple searches. Prior to contact with Moore, officers did not observe any smoke coming from the vehicle or any evidence of recent marijuana use. The evidence garnered at the suppression hearing unequivocally weakens any assertion of the requisite quantum of evidence to substantiate a probable cause finding.

Moreover, the State failed to elicit testimony or any other evidence that either officer had any training or experience relating to the odor of marijuana. The probable cause standard is a "flexible, common-sense measure of the plausibility of particular conclusions about human behavior." ***Lange,*** 2009 WI 49, ¶ 20. When determining whether probable cause existed, the Court will apply an objective standard that considers the information available to the officer combined with the officer's training and experience. ***Id.*** This means that to properly establish probable cause based on the odor of marijuana, the State must show some training that establishes an officer's ability to distinguish this odor—thereby making it unmistakable. ***Secrist***, 224 Wis. 2d at 216–217. While the State elicited testimony that both officers had conducted at least one traffic stop prior to the traffic stop in question, neither officer was asked about their training or experience in identifying the odor of marijuana, whether raw, burnt, or in liquid form; in identifying the strength, recency, or source of marijuana; or, in distinguishing the odor of marijuana from other odors, including CBD. ***Moore***, 2022 WL 2978311, ¶ 29. The State failed to elicit any testimony that either officer had even smelled the odor of marijuana prior to stopping Moore. *Contra* ***Secrist*** at 204, 218–19 (the officer "recognized the odor from his police training and his frequent contact with marijuana over [his] 23 years [of]

experience as a police officer."). ***Secrist*** specifically mandates that such evidence is necessary when determining whether the unmistakable odor of marijuana alone provides probable cause to arrest. To require anything less is to transform this standard to an *ipse dixit* which requires no showing to justify an infringement upon ones Fourth Amendment right.

V. The Court of Appeals' reading of *Secrist* is reasonable. It does not create a heightened standard and the facts of Moore's case distinguish it from the holding in *Secrist*.

As the Court of Appeals laid out, the issue in ***Secrist*** was whether the odor of marijuana, *alone,* provided probable cause to arrest for a marijuana-related offense. In its assessment of the issue, this Court differentiated between (1) probable cause to believe that a crime was committed and (2) probable cause to believe that the defendant was the one who committed the crime. ***Id.*** at 217–18. Further, it was understood that the two findings are wholly related, requiring the first finding sequentially before proceeding to the second. *See* ***id.*** This Court explained that "[t]he *unmistakable* odor of marijuana" coming from a vehicle will generally provide probable cause to believe that a crime has been committed. *Id.* at 210 (emphasis added). The analysis only begins there. To establish probable cause to arrest officers must tether the odor to the person, thereby proceeding from the first step to the second. ***Id.*** at 217–18. In ***Secrist,*** for example, the strong odor of burnt marijuana, which emanated from a vehicle driven and occupied solely by the defendant, was sufficient to link the defendant to the odor and, in tum, supplied probable cause to arrest. ***Id.*** at 218. One must note that this was highly case specific and required factual findings to buttress the assertions of the State. *See* ***id.***

Conversely, Moore's case is factually distinct. In Moore's case officers assert that they smell an odor of raw marijuana emanating from the vehicle. Unlike in ***Secrist***, the

officers failed to proffer any testimony to establish training, experience or proficiency in distinguishing the odor of THC. Therein, defeating the State's ability to meet the requirement of unmistakability.

While Moore was the sole occupant, with regard to linkage, it is irrefutable that the vehicle did not belong to him. Moreover, when he exited the vehicle officers confirmed that the odor was not emanating from his person. They said they could not smell anything on him. This directly bears upon the "linkage" requirement established in ***Secrist***. Inability to link the unmistakable odor of THC to the suspect, results in failing to meet the fact specific scenario for probable cause under odor alone.

For this cause, the lower court then proceeded to a totality of circumstances analysis where the State still failed to adduce sufficient evidence to substantiate a finding of probable cause. The Court of Appeals does not treat this case differently or heighten the standard as the state suggests, (Petitioner Br. 33). Rather, Moore's case follows ***Secrist***, in that it recognizes that these cases are fact intensive and can turn on a case-by-case basis.

The ***Secrist*** court also lays out the process by which courts are to assess the odor as "unmistakable" which would allow the State to surpass the first hurdle in a determination of probable cause. Secondly, the Court directs lower courts in how to assess the "linkage" of the odor to a suspect, which would furnish a finding of the State meeting the second hurdle, which establishes that the defendant is the one who committed the crime. ***Secrist***, 224 Wis. 2d at 218.

In assessing whether the odor was "unmistakable," courts are to examine whether the officer was qualified through training and experience to not only identify the odor, but also its recency and strength. ***Id.*** at 216. It is imperative to note, as the Court of Appeals

did, that the ***Secrist*** Court highlighted that "[i]t is important in these cases to determine the extent of the officer's training and experience in dealing with the odor of marijuana[.]" ***Id.*** The Court further explains that this is imperative because the extent of the officer's training and experience directly bears upon his ability to credibly identify the odor, which will establish whether the odor was indeed unmistakable.

Secrist goes on to give guidance on how to assess the linkage after the odor is credibly determined to be unmistakable. When examining the linkage, the Court directed that the "strong odor" or marijuana will usually be sufficient to establish probable cause to believe that the sole occupant of a vehicle is linked to the drug. ***Id.*** at 218. Unfortunately, this is where the State urges this Court to end its analysis despite the caveat rendered in ***Secrist***.

The ***Secrist*** Court further held and acknowledged that there may be other facts that may increase or decrease the linkage to the defendant—such as signs of impairment, suspicious behavior and even a "reasonable [innocent]explanation of the odor. ***Id.*** at 217–219. Therefore, the ***Secrist*** Court made it clear that this is a fact intensive analysis, which will turn upon credibility and findings of fact by the circuit court. The assertion of the State is insufficient. It does not absolve a court from assessing the credibility, reliability and existence of evidence necessary to establish probable cause to arrest. The State acknowledges the standard from ***Secrist***, attempts to highlight what the court may or may not have done, what Moore may or may not have said but fails to point to facts in the record to meet the standard. The State attempts to circumvent the fact that when one does not meet the standard, one fails. This does not mean that the standard was heightened; it was applied, and the State was found lacking.

1. **The Court of Appeals simply applied the standard established in *Secrist* to Moore's case; it did not heighten the standard.**

As held in ***Secrist***, a way to substantiate a finding of the unmistakable odor of marijuana is to show that an officer through his or her training and experience could detect the odor. *See* ***id.*** at 216–17. The State neglected to offer evidence that the officers had training or experience that would enable them to reliably identify the odor of marijuana.

The State failed to adduce any evidence regarding the officers' respective training and experience. Moreover, their training and experience regarding the detection of the odor of marijuana. There was no information adduced about the officers' ability to not only determine the odor but their respective ability to distinguish the odor, determine its source and or recency. Therefore, the Court of Appeals appropriately applied the ***Secrist*** standard when affirming the circuit court which found the state's showing lacking in the requisite quantum of evidence necessary to make a finding of probable cause based on the odor of marijuana. The Court of Appeals' affirmation of the circuit court was in no way a departure or elevation of the ***Secrist*** standard.

In accordance with ***Secrist***, the Court of Appeals noted the other findings made by the circuit court which were adduced at the hearing. Namely, that there was a potential innocent explanation for the odor emanating from the vehicle. As the Court of Appeals and the circuit court noted, the officer does not have to accept the innocent explanation given. When an officer is faced with two competing inferences, they are free to draw on the inference favoring guilt. *See* ***State v. Colstad,*** 2003 WI App 25, ¶ 11, 260 Wis. 2d 406, 659 N.W.2d 394; ***State v. Nieves,*** 2007 WI App 189, ¶ 14, 304 Wis. 2d 182, 738 N.W.2d 125. This discretion is not unfettered, nor can it be untethered to the context of the case. In Moore's case, the State failed to make a showing that officers could even distinguish the odor of marijuana from that of CBD. Therefore,

the officers were incapable of ruling out any innocent explanation because they failed to have the ability to distinguish the odor from the onset. The odor being that of CBD was not only an innocent explanation but under the totality of circumstances it was the most likely. The State's proposition is predicated on ***Secrist*** holding that requires that the odor of marijuana be unmistakable, for the odor alone to supply officers with probable cause to believe that a crime was committed. If the officers lack training to discern and distinguish the odor, then there is no way there could be a finding that in this case it was unmistakable. How could it be unmistakable if an officer cannot rule out other similar odors? The Court of Appeals correctly affirmed the circuit court when it found that the odor alone, in this case, could not render the officers with probable cause to believe that a crime had been committed.

2. The Court of Appeals correctly defined and applied this Court's meaning of "unmistakable."

The State seemingly desires to rely on semantics to the degree that it can make nebulous what is clear. This Court in ***Secrist*** held that the odor of marijuana is unmistakable if it has the distinctive and recognizable smell such that it is unlikely to be something else. ***Secrist***, 224 Wis. 2d at 217–18. The State is correct in its recognition that this Court never specifically defined the term "unmistakable." It would be misleading or indulging in an act of naivete to state that contextually the Court's meaning was not apparent. First, more than once within ***Secrist*** this Court says that the smell should be distinctive and recognizable. This means that the officer noting the odor should be able to:

> (1) distinguish the smell, presumably from other odors that might be similar and legal and,

> (2) recognize the smell, giving the officer the ability to note an experiential or referential point that gives him or her the expertise to call out or note this smell.

See ***Secrist***, 224 Wis. 2d at 216. If an officer can recognize and distinguish this smell, then the notation of said smell will be patently unmistakable. Therein lies no confusion. The standard was not elevated because the circuit court and the Court of Appeals held the State to this clear standard.

To this, the State then says that the Court of Appeals did not consult a dictionary and while the denotation seemingly relied upon is consistent with "some dictionary definitions" (State App Brief at 30) there are less rigid definitions that may be more helpful to the State. (Petitioner Br. 31)[4] The State cites to no authority for the assertion that the Court should use or has ever used a word while intending to give force to a tertiary or less common understanding of the word used.

3. Whether or not the State conceded that the odor could have been attributed to that of vaped CBD, the State failed to meet its burden under the well settled totality of circumstances test for probable cause.

The State asserts that it met its burden by conclusions that should be implied—not facts articulated as required. For instance, while the State relies on its advanced arguments during circuit court proceedings, it intentionally fails to highlight the fact that it neglected to tether the vaping device to marijuana in any way. The record is devoid of any evidence that the vaping device emitted the odor of marijuana or even that it had been used to vape THC.

[4] (Petitioner Brief 31 n.9) The State refers to distinguishing the voice of Bob Dylan. Such a comparison woefully trivializes the subject; we are not referring to the similarity of "vocal stylings" of performers, rather we are dealing with the standard required to arrest Wisconsin citizens, thus it is far more crucial to be exact in denotation, as the court was in ***Secrist.***

Moreover, while Moore acknowledged to officers that he had consumed CBD, there were no additional statements adduced to buttress the assertion that Moore must have also been vaping THC. The State wants such a speculation or inference to be sufficient to buttress a finding of fact. As the Court of Appeals held, this would be an unreasonable inference. *See generally* ***State v. Jennings,*** No. 2019AP1539-CR, unpublished slip op. ¶27 (WI App Dec. 22, 2020) (discussing unreasonable inferences).[5] The record is absent of any facts where officers, based on training and experience, would infer that folks who consume CBD are likely to also consume THC. Further, the State put forth no argument to establish the syllogism that would allow such an inference to be made—especially with no factual support.

Most importantly, the State does not meet its burden by a string of inferences. Rather, it must have and proffer available facts that meet the quantum of proof required. Probable cause for arrest exists when the totality of the circumstances within the arresting officer's knowledge would lead a reasonable police officer to believe that the defendant probably committed a crime. ***State v. Kutz***, 2003 WI App 205, ¶ 13, 267 Wis. 2d 531, 671 N.W.2d 660. The information must be sufficient to lead a reasonable officer to believe that the defendant's involvement in a crime is more than a *mere possibility*. *See* ***id.*** Therefore, probable cause requires that the *facts* available to the officer would warrant a reasonable person to believe that a crime has been committed. ***State v. Nieves***, 2007 WI App 189, ¶ 14, 304 Wis. 2d 182, 738 N.W.2d 125. The State wishes to lower this standard to mere possibility without necessarily facts articulated but inferences implied. This cannot stand.

[5] We cite this unpublished opinion for its persuasive value consistent with WIS. STAT. RULE 809.23(3).

The record reflects that when Moore was questioned about whether he used the vaping device to consume THC, Moore refrained from answering the question. While the State seeks to use this fact to draw an inference to Moore's detriment, the record also shows that it is likely that Moore failed to hear the officer's question. As noted by the Court of Appeals, the circuit court did not draw this inference against Moore, as it was not supported by the video footage in the record. A defendant's silence is not tantamount to a showing of guilt.

Ultimately the State's argument rests on the fact that:

> (1) There was an unknown liquid dispelled from the car,
>
> (2) There was an odor of a substance that might have been marijuana emanating from the vehicle when officers approached, and
>
> (3) Moore possessed a vaping device.

Petitioner Br. 40–41.

These events cannot be decontextualized from all the surrounding facts that tend to negate probable cause. No officer testified that they believed Moore to be impaired, at any point of contact. To advance the argument now as a reasonable basis for the officer to believe the aforementioned is not persuasive—the record does not support this and, therefore, is insufficient to support probable cause to arrest.

4. The State's reliance on the liquid dispelled from the car to support a finding of probable cause fails because (1) the State failed to advance and develop that argument during lower court proceedings and (2) its admission as a factor under the totality of circumstances is still insufficient.

There was a suppression hearing, where the State was to proffer all evidence that it believed supported a finding of probable cause to arrest Moore. The burden is on the State to establish that given the facts of the night would establish probable cause. This standard is what underlies the equity in an adversarial proceeding. Once the State asserts

its arguments, the defense is then given the opportunity to rebut such arguments. ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577, 584 (1997) (citing ***Perkins v. Peacock***, 263 Wis. 644, 650, 58 N.W.2d 536 (1953); *see also* ***State v. Brown***, 96 Wis. 2d 258, 291 N.W.2d 538, 541 (1980)). The Court then makes it findings and renders its decisions based on its findings of facts and the arguments asserted and rebuttals given by both sides. This is a well-established process, yet the State seeks to circumvent it by proffering arguments that the defense never had an opportunity to rebut.

The record shows that on the night in question, an officer observed Moore throw a liquid out of the car. Subsequently, an officer noticed an odorless liquid within the car. When Moore was questioned about the dispelled liquid, he denied throwing it. The State was essentially silent regarding the aforementioned facts in circuit court proceedings. Eventually, in appellate court proceedings, the State put forth the argument that a reasonable officer could conclude that the liquid was actually an illegal substance that Moore was attempting to get rid of before the completed traffic stop. The State said nothing of the like at the suppression hearing and therefore gave the defense no real opportunity to rebut such an argument devoid of factual support. ***See Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980); ***Binder v. Cty of Madison***, 72 Wis. 2d 613, 618, 241 N.W.2d 613 (1976). While the State did proffer such speculation in a reply brief, it failed to advance the argument in a substantive fashion. Further, the State again failed to sufficiently assert and develop an argument about how any reasonable inferences could be drawn from these facts to establish probable cause. ***Moore***, 2022 WL 2978311, ¶ 35.

The State seems to believe that the court should develop arguments for it, thereby relieving it of its burden and duty in an adversarial system. It is well established that the burden at a suppression hearing is not tacitly met but established by findings of facts,

reasonable inferences and arguments made based upon such. Moreover, the liquid that the officer observed was never shown to bear upon the ultimate question of probable cause. Given the underdevelopment of this argument, the appellate court correctly noted that such an argument is then forfeited given the State's negligence in advancing or sufficiently developing the argument. ***Schill v. Wisconsin Rapids Sch. Dist.***, 2010 WI 86, 327 Wis. 2d 572, 786 N.W.2d 177; *See also* ***Townsend v. Massey***, 2011 WI App 160, 338 Wis. 2d 114, 808 N.W.2d 155.

Conclusion

The State's argument is a *non sequitur*. Simply because it lost does not mean the lower court heightened a standard or misapplied ***Secrist***. The State does not get two kicks at the cat—it failed to sufficiently proffer evidence to substantiate unmistakability, linkage, or facts when considered under the totality of circumstances establish probable cause. The sky is not falling; the State simply failed to meet its burden under a well settled, fact intensive analysis. Given the ongoing technological advancements, ***Secrist*** should remain in place in the event that the State is somehow able to distinguish the odor of the illegal substance of THC, in the future. This Court should re-confirm the *status quo* of jurisprudence as it stands and affirm the lower court's holding suppressing the evidence due to a lack of probable cause.

Dated at Middleton, Wisconsin, March 9, 2023.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 200 dots per inch, 13-point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 10,705 words.

Dated: March 9, 2023.

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CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;
(2) the findings or opinion of the circuit court; and
(3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notion that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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